NO. 49624-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KHADIM HAKEEM GUEYE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Philip Sorensen

No. 16-1-01649-1

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the evidence sufficient for the State to prove beyond a reasonable doubt that spitting on another constitutes assault when spitting has been the use of unlawful force as a matter of law for over three centuries and an ordinary person who is not unduly sensitive would find being spat on offensive?

2. Was the evidence sufficient for the State to prove beyond a reasonable doubt that defendant committed criminal trespass when he remained on Pierce Transit property following a lawful exclusion order requiring him to leave the premises?

3. Did defendant receive effective assistance of counsel when his attorney did not ask for a lesser included instruction of unlawful transit conduct as such is not a lesser included offense of assault in the third degree?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Khadim Hakeem Gueye, hereinafter "defendant," was charged by amended information of one count of assault in the third degree, two counts of felony harassment, and one count of criminal trespass in the second degree. CP 7-9. Following a jury trial defendant was convicted of the assault and criminal trespass charges. CP 44, 46; RP 108-109, 114.[1] The jury was unable to reach a verdict on one count of felony harassment and acquitted on the other count.[2] CP 45, 47; RP 106, 115. The court subsequently declared a mistrial for the felony harassment charge for which the jury was unable to reach a verdict. RP 108.

Defendant was subsequently sentenced to a Drug Offender Sentencing Alternative (DOSA) sentence for the assault conviction. CP 62-78; RP 130. This entailed 30 months of confinement and 30 months of community custody on the DOSA. *Id.* For the criminal trespass conviction, defendant was sentenced to 90 confinement, but received credit for all time served. CP 79-83; RP 133. Defendant timely appealed. CP 84.

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[1] The verbatim reports of proceedings are contained in five volumes with consecutive pagination.

[2] The jury originally erred when filling out their verdict forms as to which verdict form applied to which offense. RP 109. The court had the jury return to the jury room to continue deliberations and fix any errors on the verdict forms. RP 111. The jury returned with the verdicts forms filled out correctly. RP 114-115.

2. FACTS

On April 22, 2016, defendant was seen on video surveillance laying down in the Tacoma Dome Transit Station with his shoes off. RP 31. The public safety officer monitoring the cameras called another officer over to conduct a welfare check on defendant. *Id.* Officer Kenny Gainey and Sergeant Paul Strozweski reported to the scene. RP 35.

When they reported to the scene, they saw defendant sleeping on the ground. *Id.* They tried to wake him several times before he eventually woke up. *Id.* Defendant threatened to get a gun out of his bag and shoot Sergeant Strozweski in the head. RP 43. He then stated, "I fucked your mother and she liked it. I'm going to fuck your son. I'm going to beat your ass and fuck you too, and then I'm going to shoot you in the head." RP 44. For safety purposes the sergeant handcuffed defendant. RP 43. Sergeant Strozweski immediately checked defendant's bag and person for a gun or other type of weapon. RP 44. After being handcuffed defendant was continually spitting on the ground. *Id.* Sergeant Strozweski turned defendant's back towards him so defendant would not spit on him. *Id.*

Following the search, Officer Gainey filled out a notice of exclusion. RP 35, 45. A notice of exclusion is a trespass notice stating that an individual cannot be on transit property for a certain number of days, in

defendant's case one year. *Id.* The exclusion notice applies to both being on transit property and being on buses. RP 46. Once the exclusion notice was filled out, both officers explained the parameters of it to defendant. RP 45-46.

Later that same day Cynthia Kerrigan, a bus driver for Pierce Transit, pulled her bus with around twenty passengers already on it into the Tacoma Dome Station. RP 51. When she arrived she noticed the defendant as she had already received an alert that he was to be denied service. *Id.* Defendant's appearance matched the description Kerrigan was provided. *Id.* She told him that he had been denied service. *Id.* Defendant then mumbled something as he turned to go down the stairs. *Id.* He then turned around and spat in her face. Exh. 2; *Id.* He took another step down, turned around again, and spat in her face a second time. Exh. 2; RP 51-52. She did not ask to be spat on or give him permission to spit on her. RP 52.

Deputy Joseph McDonald heard about the incident over his radio. RP 54. He proceeded to the transit station where he saw defendant leaving the area. *Id.* Defendant matched the description the officer was given. RP 55. He was first seen by the deputy on the bus islands. RP 57. Deputy McDonald was informed by dispatch that defendant had spat in the face of a bus driver twenty minutes after being excluded from transit property. *Id.* The deputy was told that defendant was last seen walking into the parking

garage. *Id.* He found defendant sitting down near the link station. *Id.* Both of these properties are owned by Pierce Transit. *Id.* Defendant talked about police officers who were killed in Lakewood and said that something similar would happen to Deputy McDonald. RP 56. This placed the deputy on high alert and he was concerned for his safety. RP 57. Once additional officer arrived, defendant was placed under arrest. *Id.*

C. ARGUMENT.

1. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME OF ASSAULT IN THE THIRD DEGREE BY SPITTING ON A TRANSIT DRIVER.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing ***State v. Green***, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* (citing ***State v. Partin***, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from the conduct where "it is plainly indicated as a matter of logical probability." ***State v. Goodman***, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. ***State v. Berg***, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Circumstantial evidence and direct evidence are equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. ***State v. Carver***, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To prove beyond a reasonable doubt that defendant is guilty of assault in the third degree, the State was required to prove that:

> (1) That on or about the 22nd day of April, 2016, the defendant assaulted [ ] Kerrigan;
>
> (2) That [ ] Kerrigan was employed as a transit operator or driver by a public transit company;
>
> (3) That [ ] Kerrigan was then operating or in control of a vehicle that was owned or operated by a transit company;
>
> (4) That the vehicle was occupied by one of more passengers; and
>
> (5) That the acts occurred in the State of Washington.

CP 20-43 (Instruction No. 9); RCW 9A.36.031(1)(b). Assault requires an intentional touching of another person with unlawful force that is harmful or offensive. WPIC 35.50; CP 20-43 (Instruction No. 9). Defendant only challenges that the evidence was insufficient to support a conviction for element (1), specifically that there was no evidence the spitting was offensive or done with unlawful force. *See* Brf. of App. at 9, 11. When the evidence is viewed in the light most favorable to the State, it is clear the evidence was sufficient for a rational jury to find defendant spitting on Kerrigan was offensive and the use of unlawful force.

a. The evidence was sufficient for a rational jury to find the act of spitting on another offensive touching.

Spitting is a touching as a matter of law. ***State v. Humphries***, 21 Wn. App. 405, 409, 586 P.2d 130 (1978), ***State v. Jackson***, 145 Wn. App. 814, 821, 187 P.3d 321 (2008); *see also* ***State v. Valdez***, 2016 WL 3702726 at 3 (2016).[3] A touching is offensive when it would offend an ordinary person who is not unduly sensitive. WPIC 35.50. Spitting can be considered to be offensive contact with another. ***State v. Hall***, 104 Wn. App. 56, 65-66, 14 P.3d 884 (2000).

Here, there is no dispute defendant spit on Kerrigan. During her testimony, Kerrigan did not testify whether the touching was offensive. However, the circumstantial evidence indicates that being spat on is offensive. The jury was properly instructed that a touching is offensive if it would offend an ordinary person who is not unduly sensitive. CP 20-43 (Instruction No. 8). The jury was further instructed that for circumstantial evidence, they could reasonable infer something that is at issue in a case based upon their common sense and experience. CP 20-43 (Instruction No. 4). Just because Kerrigan did not testify that being spat on was offensive to her, does not mean the spitting was not offensive. Video evidence of the

[3] GR 14.1 allows for citations to unpublished opinions filed on or after March 1, 2013 for persuasive value only as the court deems appropriate.

assault was played for the jury. At approximately 0:24 seconds into the video, defendant spits on Kerrigan for the first time. Exhibit 2. When she is first spat on, she verbally reacts by saying "Hey! Whoa!" *Id.* He then spits on her a second time as he is exiting the bus. *Id.* After the second spit it appears Kerrigan wipes the spit off of her face. *Id.* Both her verbal and physical reactions show that she found being spat on offensive.

Further, the jury could use their common sense and experience to easily determine that being spat on would offend an ordinary person who is not unduly sensitive. This logic applies directly with the ***Hall*** Court's holding that being spat on can constitute harmful or offensive contact. ***Hall***, 104 Wn. App. at 66. As such, when the evidence is viewed in the light most favorable to the State, the evidence was sufficient for a rational jury to find beyond a reasonable doubt that being spat on is offensive. This Court should affirm defendant's conviction.

b. Spitting on another without their consent is physical contact constituting assault as a matter of law and hence, is the use of unlawful force.

"At the common law, a touching is unlawful when the person touched did not give consent to it, and was either harmful or offensive." ***State v. Shelley***, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997). Since at least 1705 the common law has considered projecting one's bodily fluids on another to be unlawful touching sufficient to support a conviction for

assault. ***Jackson***, 145 Wn. App. at 821 (citing ***People v. Peck***, 260 Ill. App.3d 812, 814, 198 Ill. Dec. 760, 633 N.E.Ed 222 (1994) (citing ***Regina v. Cotesworth***, 6 Mod. Rep. 172, 87 Eng. Rep. 928 (Q.B. 1705)). As previously discussed spitting is a touching as a matter of law. ***Humphries***, 21 Wn. App. at 409, ***Jackson***, 145 Wn. App. at 821.

Kerrigan made it abundantly clear during her testimony that she did not give consent for defendant to spit on her. RP 52. Defendant spitting on Kerrigan is offensive contact, as discussed above. As ***Jackson***, *supra* made clear, projecting one's bodily fluids on another without their consent is an unlawful touching. Spitting on another is projecting one's bodily fluids on another. As such, when viewed in the light most favorable to the State, the evidence was sufficient for a rational jury to find beyond a reasonable doubt that defendant spitting on Kerrigan was an intentional touching of another with unlawful force. This Court should affirm defendant's conviction for assault in the third degree.

2. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME OF CRIMINAL TRESPASS IN THE SECOND DEGREE BY REMAINING ON PROPERTY HE WAS EXPLICTLY TOLD TO VACATE.

The general law and standard of review is identical to the State's sufficiency of the evidence argument above. The only difference is for

what the State was required to prove beyond a reasonable doubt. For criminal trespass in the second degree the State was required to prove:

> (1) That on or about the 22nd day of April, 2016, the defendant knowingly entered or remained in or upon the premises of another;
>
> (2) That the defendant knew that the entry or remaining was unlawful;
>
> (3) That the acts occurred in the County of Pierce in the State of Washington.

CP 23-40 (Instruction No. 19); RCW 9A.52.080.

Defendant argues that the evidence was insufficient to show that he knew he was excluded from the bus, that the area near the link station was not properly marked, and that he had an inadequate amount of time to exit the property after being excluded. *See* Brf. of App. at 12-17. All of defendant's argument either misconstrues the law or when viewed in the light most favorable to the State there was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant committed the charged offense.

The evidence showed that Officer Gainey filled out a notice of exclusion. RP 35, 45. The exclusion notice applied to both being on transit property and being on buses. RP 46. Sergeant Strozweski testified that once the exclusion notice was filled out, both officers explained the parameters of it to defendant. RP 45-46. It is a reasonable inference that he

would have explained to defendant that he was not allowed to be on buses during the exclusion period. Based upon his testimony and such an inference, the evidence supports the fact defendant knew he was excluded from the bus, and yet, he chose to board the bus. Further, when Kerrigan told the defendant to leave the bus as he was excluded, he did not argue with her or claim that he was only excluded from physical transit property. Rather, he spat on her twice. RP 51-52. A jury could easily infer from this that defendant did not argue with Kerrigan because he knew that he was not allowed on the bus. His spitting was a manifestation of his frustrations. As this evidence in and of itself is sufficient to support defendant's conviction, this Court can affirm the conviction from the sole act of defendant being on the bus.

Next, defendant argues that under RCW 9A.52.010(2), the area near the link station must have adequately posted that such was transit property to give notice to those excluded. *See* Brf. of App. at 15-16. However, this argument misconstrues the law. RCW 9A.52.010(2), in relevant part, states:

> *A person who enters or remains upon unimproved and apparently unused land*, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or *unless notice is given by posting in a conspicuous*

> *manner*. Land that is used for *commercial aquaculture or for growing an agricultural crop or crops*, other than timber, is not unimproved and apparently unused land if a crop or any other sign of cultivation is clearly visible *or if notice is given by posting in a conspicuous manner*. Similarly, a field fenced in any manner is not unimproved and apparently unused land. *A license or privilege to enter or remain on improved and apparently used land* that is open to the public at particular times, which is neither fenced nor otherwise enclosed in a manner to exclude intruders, *is not a license or privilege to enter or remain on the land at other times if notice of prohibited times of entry is posted in a conspicuous manner*.

RCW 9A.52.010(2) (emphasis added).

The requirements for posting only applies to unimproved land, land used for aquaculture or agriculture, and improved land during particular hours. There is no requirement that there be a public posting that each and every piece of land encompassing a larger property or holding of a given individual or entity is in fact their property. Rather, the type of land relevant here, improved and apparently used land, only requires posting for the *times* that entry is prohibited and would thus encompass trespass. There is no requirement that the land have a posting that tells individuals that they might not be allowed on the land itself. Defendant's argument is simply misconstruing the law based upon its plain words and meaning.

Even if defendant's argument was accurate, he still would have committed the crime of trespass in the second degree at that point for that

act. After being ordered to leave the bus, defendant then goes through the parking garage and stops by the link station. RP 57. At that point, he has already been told that he is not allowed on Pierce Transit property and he is not allowed on the bus. RP 45-46, 52. Yet, after being told to leave by the police and that he was not allowed on the bus by Kerrigan, he still chose to remain on the property. It is a logical inference that a parking garage connected to the Tacoma Dome Station and a link station are both Pierce Transit property. The jury could easily infer from this that he knowingly chose to remain, even though he had been ordered to leave. As such, when viewed in the light most favorable to the State, his remaining in the parking garage and link station is sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant committed the crime of trespass in the second degree.

Defendant's final argument is there was no evidence presented that he had an adequate amount of time to leave Pierce Transit property. *See* Brf. of App. at 16-17. This argument is inconsistent with the facts. The evidence presented showed how defendant spat in Kerrigan's face twenty minutes after he was excluded from transit property. RP 57. He is then seen by Deputy McDonald on the bus islands. *Id.* The deputy is informed defendant was last seen walking into the parking garage before he is found sitting down near the link station. *Id.*

Based upon these facts, a jury could have easily concluded defendant remained on transit property after the exclusion order was given and he had enough time to exit the property. While there was no testimony of the size of the Tacoma Dome Station, a rational jury could conclude that the twenty minutes between the exclusion and spitting on Kerrigan was more than enough time to exit the property. Further, even after spitting on Kerrigan, defendant still willingly chose to remain on the property. He goes to three different locations that are transit property: the bus islands, the parking garage, and the link station. When viewed in the light most favorable to the State, a rational jury could use their common sense to find beyond a reasonable doubt this is circumstantial evidence that defendant had more than enough time to exit the property, yet willingly chose to remain.

This Court should affirm defendant's conviction for criminal trespass in the second degree as when viewed in the light most favorable to the State, a rational jury could find there was sufficient evidence to find defendant guilty beyond a reasonable doubt.

3. DEFENSE COUNSEL PROPERLY DID NOT ASK FOR A LESSER INCLUDED OFFENSE JURY INSTRUCTION AS UNLAWFUL TRANSIT CONDUCT IS NOT A LESSER INCLUDED OFFENSE OF ASSAULT IN THE THIRD DEGREE.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such an adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) his or her attorney's performance was deficient, and (2) he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters which go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Under the second prong, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. 668 at 689. This Court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena

necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The ***Workman*** test provides that a defendant is entitled to instructions on a lesser included offense if (1) each element of the lesser included offense is a necessary element of the charged offense, and (2) the evidence supports an inference the lesser crime was committed. ***State v. Workman***, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978). The first prong is the legal prong and the second prong is the factual prong. A court should only provide a lesser included offense instruction under ***Workman***'s factual prong if the evidence would permit a jury to rationally acquit the defendant of the greater offense while convicting him or her of the lesser offense. ***State v. Corey***, 181 Wn. App. 272, 276, 325 P.3d 250 (2014) (citing ***State v. Fernandez-Medina***, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)). The court must ask whether the evidence presented supports the inference that *only* the lesser offense was committed to the exclusion of the greater offense. ***State v. Condon***, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (emphasis in original).

The inclusion or exclusion of lesser included offense instructions is a tactical decision for which defense attorneys require significant latitude. ***State v. Grier***, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011). The decision to

not request a lesser included offense instruction is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. ***State v. Hassan***, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). When a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy. ***State v. Breitung***, 173 Wn.2d 393, 399-400, 267 P.3d 1012 (2011) (quoting ***State v. Hassan***, 151 Wn. App. at 220 (citing ***Strickland***, 446 U.S. at 691)).

Defendant argues for the first time on appeal that his trial counsel was ineffective as counsel failed to request an unlawful transit conduct instruction as a lesser included offense for assault in the third degree. *See* Brf. of App. at 18. However, his argument fails as unlawful transit conduct does not meet either the legal or factual prong of the ***Workman*** test. As discussed previously, to convict defendant of assault in the third degree the State was required to prove:

> (1) That on or about the 22nd day of April, 2016, the defendant assaulted [ ] Kerrigan;
>
> (2) That [ ] Kerrigan was employed as a transit operator or driver by a public transit company;
>
> (3) That [ ] Kerrigan was then operating or in control of a vehicle that was owned or operated by a transit company;
>
> (4) That the vehicle was occupied by one of more passengers; and

(5) That the acts occurred in the State of Washington.

CP 20-43 (Instruction No. 9); RCW 9A.36.031(1)(b). These elements are clearly distinct legally from the elements for unlawful transit conduct:

> (1) A person is guilty of unlawful transit conduct, if while on or in a transit vehicle or in or at a transit station, he or she knowingly:
>
> ...
>
> (e) Spits, expectorates, urinates, or defecates, except in appropriate plumbing fixtures in restroom facilities.

RCW 9.91.025(1)(e). For assault in the third degree, the victim must be a person, here specifically a bus driver. Unlawful transit conduct does not require an individual to be the victim. Assault in the third degree requires that the assault occur on a vehicle that has passengers in it and the victim is in control or operating the vehicle, neither requirement is needed for unlawful transit conduct. As the elements that would be needed to convict defendant of unlawful transit conduct are clearly distinct from assault in the third degree, ***Workman***'s legal prong is not met.

Even if the legal prong is met, the factual prong is not met. The evidence does not support the inference that only the lesser offense was committed at the exclusion of the greater offense. Defendant targeted Kerrigan when he spat on her. Exhibit 2. He took willful and deliberate actions to spit on her versus merely spitting in a bus. *Id.* A jury could not rationally acquit defendant of assault while convicting him of unlawful

transit conduct as his actions were directed at Kerrigan instead of just spitting on the bus. As such, ***Workman***'s factual prong is not met.

Assuming arguendo that both the legal and factual prong of ***Workman*** are met, defendant still cannot show that he received ineffective assistance of counsel. Defendant cannot show how his counsel's performance was deficient and, if it was deficient, he cannot show that counsel's errors were so serious as to deprive defendant of a fair trial. ***State v. Miller***, 158 Wn. App. 360, 241 P.3d 456 (2010) is informative on this point. In ***Miller***, defendant was charged with premediated first degree murder. ***Miller***, 158 Wn. App. at 362. The Court found there was "scant evidence" that the murder was anything other than premeditated. *Id.* at 371. Even if there was evidence supporting a lesser included offense instruction counsel was not ineffective in failing to request such an instruction. *Id.* Rather, counsel made a conscious choice to pursue an acquittal outright rather than conviction on the lesser offense. *Id.*

Here, the same logic applies. Defense counsel easily could have been attempting to obtain an outright acquittal. A lesser included offense would have weakened defendant's claim of innocence. There was no dispute at trial that defendant spat on a bus. That alone would have resulted in a conviction for unlawful transit conduct. Assault though was significantly more complicated for the State to prove beyond a reasonable

doubt. Just because defendant spat on the bus does not mean he committed assault. Rather, the State was required to prove that a touching occurred, the touching was unlawful force, the victim was offended, the victim was a bus driver who was on duty, and there were passengers on the bus. CP 20-43 (Instruction No. 8-9). This is significantly more than is required for the undisputed act that defendant did spit on a bus. As such, counsel's decision not to request a lesser included offense instruction, if one was even warranted, would not prejudice defendant as it could be seen as a legitimate attempt to try and get an acquittal for his client.

Defendant was charged with four counts, three of which were felonies. CP 7-9. He was acquitted of one felony and had a hung jury on a second felony. CP 45, 47; RP 106, 115. Rather than being ineffective, defense counsel was extremely effective and competent in ensuring that defendant was not convicted of multiple felonies.

For the foregoing reasons, this Court should deny defendant's claim of ineffective assistance of counsel as he was not entitled legally or factually to lesser included offense instructions and defendant's representation was not deficient nor did it prejudice defendant.

D. CONCLUSION.

Viewed in the light most favorable to the State, the evidence was sufficient for a rational jury to find beyond a reasonable doubt that

defendant committed assault in the third degree by spitting on Kerrigan. Defendant's act was offensive and involved the use of unlawful force. Further, the evidence was sufficient to prove beyond a reasonable doubt that defendant committed the crime of unlawful trespass in the second degree as he remained on transit property after being explicitly told to vacate the property. Finally, defense counsel was not ineffective as unlawful transit conduct is not a lesser included offense of assault in the third degree and, even if it was, defendant cannot show his counsel was deficient or he was prejudiced by not receiving lesser included offense instructions. For the foregoing reasons this Court should affirm defendant's conviction on both counts.

DATED: August 31, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

Nathaniel Block
Rule 9 Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-31-17 Theresa Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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